UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 15-0202 AG (JCGx)	Date	December 29, 2016
Title	AFROUZ NIKMANESH v. WAL-MART STORES, INC. ET AL.		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:

Proceedings: [IN CHAMBERS] ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Afrouz Nikmanesh, Elvis Atencio, Anna Nguyen, and Effie Spentzos, on behalf of themselves and others similarity situated, ("Plaintiffs") sued Defendants Wal-Mart Stores, Inc. and Wal-Mart Associates, Inc. (together "Walmart") for various wage-and-hour claims. Plaintiffs have now brought a motion for class certification.

The Court DENIES Plaintiffs' motion for class certification. (Dkt. No. 152.)

1. BACKGROUND

Walmart operates around 300 pharmacies in California. (Dkt. No. 155 at 10.) Approximately 1,300 pharmacists have worked at these pharmacies since 2010. (*Id.*) The four named individuals that Plaintiffs ask the Court to appoint as class representatives, Nikmanesh, Nguyen, Spentzos, and Atencio, worked as Walmart's pharmacy managers. (*Id.*) Plaintiffs allege Walmart violated California wage and hour law and ask the Court to certify the following classes:

> a. All current and former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who did not take a 10-minute rest break during the first 4 hours of their shift, or a second 10-minute rest break for all shifts of 6-10 hours, when they were scheduled to be the only Pharmacist on

duty at any time during their shift, within four years before the filing of the original complaint until the date of judgment (the "Rest Break Class").

b. All current and former non-exempt employees, employed by Defendants as Pharmacists within the State of California, who are members of the Rest Break Class, and as a result of the rest break claims alleged in the Second Amended Complaint, were not provided with accurate, itemized wage statements as required by California Labor Code §226, within one year before the filing of the original Complaint until the date of judgment ("Wage Statement Class").

c. All former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who are not members of the Training Course Class, but are members of the Rest Break Class, and as a result of the rest break claims alleged in the Second Amended Complaint, were not paid all wages due and owing at the time of their separation as required by California Labor Code §§201-203, within three years from the filing of the original Complaint until the date of judgment ("Waiting Time Class").

Plaintiffs state that they also seek to certify a class under California's Unfair Competition Law (Bus. & Prof. Code §§17200, et seq.) ("UCL Class"). (Dkt. No. 152 at 2.) The Wage Statement, Waiting Time, and UCL Classes are all derivative of the Rest Break Class.

According to Plaintiffs, the class members are pharmacist employees who worked for Walmart in its California stores during the relevant time period. The declarations filed with Plaintiffs' motion are from pharmacists who worked in 88 of the 310 California Walmart stores. Plaintiffs allege that Walmart's written rest break policy isn't and can't be followed because of other Walmart policies. One of those policies was Walmart's scheduling practice that caused only one pharmacist to be on duty for long shifts and all days on weekends. (*Id.* at 15.) Other Walmart policies that prevented putative class members from taking a rest break, according to Plaintiffs, are:

1. The Pharmacist was prohibited from leaving the Pharmacy unattended without first "securing" the Pharmacy. Securing the pharmacy involved a

> series of mandated steps, which took an average of 10-15 minutes to complete . . . . Re-opening the Pharmacy took approximately another 5-10 minutes.
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> 2. Wal-Mart required all Pharmacists to set the pharmacy alarm when they closed the pharmacy, thereby generating a data "trail" to ascertain if and when the pharmacy was closed.
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> 3. Pharmacists were discouraged from closing down the pharmacy for rest breaks. Moreover, a Pharmacist could not take an uninterrupted rest break inside the Pharmacy because pursuant to Wal-Mart policy the Pharmacist is responsible for preventing drug diversion and controlling access to the Pharmacy. Therefore, the Pharmacist is "on duty" if he or she is inside the Pharmacy taking a "break" because he/she must still monitor the Pharmacy and employees to prevent drug diversion and control unauthorized access to the Pharmacy.
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> 4. Wal-Mart evaluated the performance of Pharmacists, in part, based on a series of customer service directives. Wal-Mart's . . . Manual . . . contains common Wal-Mart directives for pharmacy employees. One such directive was Pharmacists were required to fill in-store prescriptions within 20 minutes of receipt and receive high marks on customer survey responses. Another directive requires Pharmacists to answer the telephone in the pharmacy within 3 rings. Taking a rest break would jeopardize these metrics upon which Pharmacists were evaluated. Wal-Mart informs employees, including Pharmacists that negative customer evaluations can lead to termination.

(*Id.* at 11–13.)

Further, Plaintiffs allege that pharmacists' managers "actively discouraged Plaintiffs and Rest Break Class Members from closing the pharmacy for rest breaks." (*Id.* at 17.) Plaintiffs state that all of these policies and requirements "combined to prevent or discourage Pharmacists from taking rest breaks." (*Id.* at 19.)

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Defendants argue that class certification should be denied because Plaintiffs haven't established any common evidence of when pharmacists missed rest breaks and whether any missed breaks were caused by Walmart. Defendants also argue that class certification should be denied because the named Plaintiffs are neither adequate nor typical. (Dkt. No. 155 at 9.)

2. PRELIMINARY MATTERS: EVIDENTIARY OBJECTIONS

Defendants object to the declaration from Dr. Malcolm Cohen, which Plaintiffs rely on in their motion for class certification. Dr. Cohen holds a Ph.D. in Economics from MIT. He worked for the U.S. Bureau of Labor Statistics in Washington D.C. where he served as a Special Census Agent. In his declaration, Dr. Cohen states that by examining time clock and alarm data and conducting a survey, he believes he can identify pharmacists who missed rest breaks. Defendants object to Dr. Cohen's declaration on two grounds—1) it is irrelevant, and 2) it is too cursory to be reliable or helpful. (Dkt. No. 156 at 5–6.)

Defendants argue that Dr. Cohen's proposed analysis of data is irrelevant because it's only meant to determine which pharmacists "missed rest breaks" but Plaintiffs have to show Defendants didn't authorize and permit rest breaks to establish liability. For their second ground for an objection, Defendants use their own experts to try to prove that Dr. Cohen's proposed methodology is unreliable. Defendants ask the Court to use Rule 702 and the *Dauber* test to decide whether Dr. Cohen's declaration is admissible.

The Supreme Court hasn't determined whether Rule 702 of the Federal Rules of Evidence applies at the class certification stage. ("The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, ..." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) (citation omitted)). The Ninth Circuit has stated that a district court that applied the *Daubert* test at the class certification stage in a motion to strike analysis did so "correctly." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). But at least one court in the Central District of California has decided that the Ninth Circuit's holdings regarding expert testimony at the class certification stage should be distilled "into the conclusion that, at the class certification stage, district courts are not required to conduct a full *Daubert* analysis. *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 495 (C.D. Cal. 2012). Rather, district courts must conduct an analysis tailored to whether an expert's opinion was sufficiently reliable to admit for the purpose of proving or disproving Rule 23 criteria, such as commonality and predominance." *Id.*

This Court will also perform a tailored reliability analysis of Dr. Cohen's declaration. Rule 702 states the following:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> > (b) the testimony is based on sufficient facts or data;
> > (c) the testimony is the product of reliable principles and methods; and
> > (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Civ. P. 702.

Under *Daubert*, "to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.,* 'good grounds,' based on what is known." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). A district court has wide discretion in determining both whether an expert's testimony is reliable and also in deciding how to determine the testimony's reliability. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Defendants argument that Dr. Cohen's declaration is irrelevant because it doesn't establish liability isn't persuasive. This question on the merits of the lawsuit isn't appropriate at the class certification stage. The remaining concerns that Defendants have are addressed by Dr. Cohen's response declaration. For example, Defendants' expert pointed out that Dr. Cohen doesn't address the possibility of pharmacists taking breaks near or inside the pharmacy, where the alarm didn't need to be on. Dr. Cohen has clarified that Plaintiffs' theory of liability is that pharmacists weren't actually on a rest break if they had remained inside or near the pharmacy because they had to observe the pharmacy to follow Walmart's policy of preventing drug diversion.

The Court finds Dr. Cohen's declaration to be admissible evidence for the purposes of this motion.

3. LEGAL STANDARD

The class action is an exception to the way litigation usually goes: typically, lawsuits are litigated just by the individual named parties. *Dukes*, 564 U.S. at 348. This exception is only justified if certain requirements are met.

First, a plaintiff seeking class certification must show that a proposed class satisfies the four elements of Federal Rule of Civil Procedure 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation by the class representatives and class counsel. Fed. R. Civ. P. 23(a). All of these elements must be satisfied for a class to be certified.

Second, a plaintiff seeking class certification must show that a proposed class satisfies the requirements of at least one of three subsections of Rule 23(b). The three subsections of Rule 23(b) state: (1) that prosecuting separate actions would create a risk of inconsistent or varying adjudications; (2) that the party opposing class certification has acted or failed to act on grounds that apply generally to the class; or (3) questions of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for adjudicating the dispute. Fed. R. Civ. P. 23(b)(1)–(3). Only one of these factors needs to be satisfied for a class to be certified.

As a final note, all of these requirements aren't "mere pleading standard[s]." *Dukes*, 564 U.S. at 350. A party seeking class certification must "affirmatively" show that these requirements have been met, and survive a "rigorous analysis" that may "entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 350–51.

4. ANALYSIS

4.1 Rule 23(a)(1)—Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[I]mpracticability does not mean impossibility," but simply that joinder of all class members must be difficult or inconvenient. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964).

A proposed class of at least forty members may satisfy the numerosity requirement. *See Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds by County of Los Angeles v. Jordan*, 459 U.S. 810 (1982). Plaintiffs have a list of 1,251 current and former non-exempt California Walmart pharmacists who worked during the relevant time period. Numerosity is therefore met. (Dkt. No. 152 at 22.)

4.2 Rule 23(a)(2)—Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The proposed class' claims "must depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350.

Plaintiffs assert that the common questions are "(1) whether Wal-Mart's common policies competed with the written rest break policy thereby creating an unofficial policy of preventing, impeding or discouraging legally mandated rest breaks, and (2) whether Wal-Mart paid rest break premiums to employees who missed rest breaks." (Dkt. No. 157 at 9.) Plaintiffs submit several declarations from employees stating that they were prevented or discouraged from taking rest breaks by Walmart policies. Plaintiffs also rely on several official written policies to allege that class members were prevented from taking rest breaks.

Defendants argue that this theory of liability isn't a basis for class certification because "any analysis of whether these policies or procedures in fact prevented pharmacists from taking rest breaks depend on several variables, including each individual's schedule, productivity, work habits and preferences." (Dkt. No. 155 at 17.) This argument is more persuasively directed to defeating the Rule 23(b)(3) requirements. So instead of discussing commonality, which is a closer call, the Court now turns to the requirements of Rule 23(b)(3), which are not met here.

4.3 Rule 23(b)(3)

Plaintiffs seek class certification under Federal Rule of Civil Procedure 23(b)(3). Rule 23(b)(3) allows a court to grant class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The Ninth Circuit recently held that the "predominance" requirement of Rule 23(b)(3) wasn't met in a case where plaintiffs alleged rest break violations, since variables differed for each class member. *Wright v. Renzenberger, Inc.*, 2016 WL 3924388, at *2 (9th Cir. July 21, 2016). The court held that the defendant's "policies do not uniformly deprive employees of rest breaks, the effect of the policies depends instead on their interaction with . . . variables, which differ for each class member." *Id.*

There are too many variables at play here that affected class members individually and differently for "questions of law or fact common to class members" to "predominate" over questions affecting only individual members. The following are just a few examples of these variables. First, Defendants point out that Walmart doesn't have a requirement that in-store prescriptions be filled within 20 minutes, although "*some* Market Directors and Regional Directors have identified that timing as a goal." (Dkt. No. 155 at 18 (emphasis added).) Second, while a class member stated that it didn't "make sense" to go through the security measures "for almost 35 minutes" to close down the pharmacy for a 10 minute break, there's evidence that it took other pharmacists as little as 30 seconds to close a pharmacy. (*Id.* at 20.) One of Plaintiffs' own exhibits shows that the process for closing down a pharmacy varies depending on the store's layout and number of doors or gates. (Dkt. No. 153 at 70.) This pharmacist also testified that it takes him "no more than one minute" to close down the pharmacy and take a break. (*Id.*) Third, while filling in-store prescriptions within 20 minutes

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was Walmart's goal, failing to do so didn't automatically have negative consequences for each class member. (*Id.* at 73.) The consequences instead depended on the pharmacist's individual situation. (*Id.*) Different class members experienced different situations and "policies" that allegedly prevented them from taking mandated rest breaks. A company goal or policy that encourages one employee to work harder and prevents his or her from taking breaks doesn't necessarily have the same effect on all other employees. The common questions do not predominate over questions affecting only individual class members in this case.

Shortly before oral argument, plaintiffs cited a very recent case, decided on November 21, 2016. *See Lubin v. Wackenhut Corp.*, 210 Cal. Rptr. 3d 215 (Cal. Ct. App. 2016). This state appellate decision reversed the state trial court after the trial court reversed itself on a class certification motion following the United States Supreme Court's decision in *Dukes*. Just before reversing itself, the *Lubin* trial court received further briefing on a new case from the California Supreme Court. *See Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012). So, to review, plaintiffs call upon the Court to discern the law applicable in this federal case by reviewing a very recent state court of appeal decision reversing a state trial judge who, with guidance from the California Supreme Court in *Brinker*, reversed himself under *Dukes*. As this Court noted at the hearing on this matter, there is uncertainty about the interplay of state and federal law here, both concerning class certification requirements, and developing substantive wage and hour law. And its worthy of note that *Dukes* involved sex discrimination and its unique body of substantive federal law. In all events, *Lubin* doesn't convince this Court that plaintiffs have affirmatively established the requirements for class certification under Rule 23. *See Dukes*, 564 U.S. at 350–51.

5. DISPOSITION

The Court DENIES Plaintiffs' motion for class certification. (Dkt. No. 152.)

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